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U.S. District Court
Eastern District of MO

UNITED STATES DISTRICT COURT
DISTRICT OF MISSOURI

**APPLICATION FOR A WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY**

KENNETH SILLS, 532213, Petitioner,
Full Name and Prisoner Number

JEFFERSON CITY CORRECTIONAL CENTER
Complete Prison Address (Place of Confinement)

8200 No More Victims Road

JEFFERSON CITY, MISSOURI 65102

Case No. _____
(To be supplied
by the Court)

v.

MICHAEL BOWERSOX, Respondent,
(Name of Warden or authorized person
having custody of petitioner)
(Do not use *et al.*)

and

_____, Additional Respondent.
(List additional persons having custody
of petitioner, if any)

Note: If the applicant is attacking a judgment which imposed a sentence to be served in the future, applicant must fill in the name of the state where the judgment of conviction was entered. If the applicant has a sentence to be served in the future under a federal judgment, which he/she wishes to attack, he/she should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.

CONVICTION UNDER ATTACK

- 1) Name and location of the court which entered the judgment of conviction under attack Missouri Circuit Court, 22nd Judicial Circuit
(St. Louis)
- 2) Date judgment of conviction was entered March 11, 2011
- 3) Case number (in state court) 0822-CR06185
- 4) Type and length of sentence imposed life imprisonment
- 5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion? Yes ☐ No ☒
- 6) Nature of the offense involved (all counts) Murder in the First Degree;
and Armed Criminal Action
- 7) What was your plea? (check one)
Not Guilty ☒ Guilty ☐ Nolo Contendere ☐
- 8) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
N/A
- 9) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement N/A
- 10) Kind of trial (check one) Jury ☒ Judge only ☐
- 11) Did you testify at trial? Yes ☐ No ☒

DIRECT APPEAL

12) Did you appeal from the judgment of conviction? Yes x No

13) If you did appeal, give the name and location of the court where the appeal was filed, the result, the case number and date of the court's decision (or attach a copy of the court's opinion or order):

Missouri Court of Appeals for the Eastern District;

Affirmed March 27, 2012; Case Number ED96501

14) If you did not appeal, explain briefly why you did not:

N/A

a) Did you seek permission to file a late appeal? Yes No N/A

POST-CONVICTION PROCEEDINGS

15) Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes x No

16) If your answer to 15 was "Yes," give the following information:

a) FIRST petition, application or motion.

1. Name of court Missouri Circuit Court, 22nd Judicial Circuit

2. Nature of proceeding Motion under MO R. Crim. P. 29.15

3. Claims raised Trial counsel ineffective for failing to make Batson objection, and for failing to object to state's voir dire examination

4. Did you receive an evidentiary hearing on your petition, application or motion? Yes No x

5. Result Denied

6. Date of result November 21, 2014

7. Did you appeal the result to the highest state court having jurisdiction? Yes X No If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order)

Missouri Court of Appeals, Eastern District; Pending

8. If you did not appeal, briefly explain why you did not N/A

b) As to any SECOND petition, application or motion, give the following information:

1. Name of court Missouri Circuit Court, 22nd Jud. Cir.

2. Nature of proceeding Movant's Second Motion Under

MO R. Crim. P. 29.15

3. Claims raised Appellate Counsel and Postconviction
counsel ineffective

4. Did you receive an evidentiary hearing on your petition, application or motion? Yes No X

5. Result Not filed by Court

6. Date of result unknown

7. Did you appeal the result to the highest state court having jurisdiction? Yes No X If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order)

8. If you did not appeal, briefly explain why you did not _____
Appeal unavailable, by Rule.

c) As to any THIRD petition, application or motion, give the following information:

1. Name of court _____ N/A

2. Nature of proceeding _____ N/A

3. Claims raised _____ N/A

4. Did you receive an evidentiary hearing on your petition, application or motion? Yes ___ No ___ N/A

5. Result _____ N/A

6. Date of result _____ N/A

7. Did you appeal the result to the highest state court having jurisdiction? Yes ___ No ___ If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order) _____

N/A

8. If you did not appeal, briefly explain why you did not _____

N/A

CLAIMS

17) State concisely every claim that you are being held unlawfully. Summarize briefly the facts supporting each claim. If necessary, you may attach extra pages stating additional claims and supporting facts. You should raise in this petition all claims for relief which relate to the conviction under attack.

In order to proceed in federal court, you ordinarily must exhaust the remedies available to you in the state courts as to each claim on which you request action by the federal court.

Claim One: PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE
OF COUNSEL ON DIRECT APPEAL AND IN POSTCONVICTION PROCEEDING

(1) Supporting Facts: (Without citing legal authorities or argument state briefly the facts in support of this claim)

See Pages 6A-6C.

(2) Statement of exhaustion of state remedies as to claim one:

Direct Appeal

(a) If you appealed from the judgment of conviction, did you raise this issue? Yes ☐ No ☒

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not Appellate Counsel was ineffective

Post-Conviction Proceedings

Paragraph 17(1) SUPPORTING FACTS:

1. The trial transcript reflects that the trial court, sua sponte, ordered the courtroom closed to spectators/the public during a critical stage of the trial, where it addressed the jury in response to a jury note. (Transcript page 724, Exhibit A, attached). The trial court stated no reasons for the closure, in violation of the rule established in Waller v. Georgia, 467 U.S. 39 (1984). Most importantly, the record shows that the petitioner was never advised of the closure.

The violation of the petitioner's right to a public trial was not only a plain error on direct appeal, but a structural error as well. See United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (noting that the denial of the right to a public trial is a structural error) and Walton v. Briley, 361 F3d 431 (7th Cir. 2004) (holding same).

This issue was apparent from the face of the record. There was no strategical reason for counsel to omit this claim from his brief on direct appeal, where he advanced claims that were either waived or meritless. See Shaw v. Dwyer, 555 F.Supp2d. 1000, 1006 (E.D. of MO., 2008) (granting habeas petition where counsel failed to raise a strong claim)

A claim that appellate counsel failed to raise a structural error under plain error review on direct appeal has been found to be constitutional, substantial, and meritorious. See Roe v. Delo, 160 F3d 416 (8th Cir. 1998) (finding appellate counsel ineffective for failing to raise a structural error under plain error review)

2. During closing argument, the prosecution made the following comments:

"We know the person that put three bullets in Marshall's brain...is the defendant"...(Transcript page 680)

"That is deliberation, to put three rounds into someone's face from point blank range, then to walk back to a car and fire five more shots." (Transcript page 681)

"Now, Mr. Jimmerson didn't bring it up because he can't... He says no one saw him walk up and shoot. He is correct. Well, a bunch of people did, but never came forward." (Transcript page 711)

"Now, the records of the calls, all right. If I am saying something, I am going to bring in something to back it up. She didn't bring it in. He tried to put that back on me. She didn't bring any records in. If they exist, why wouldn't they have brought it in to support her testimony." (Transcript page 717).

(See Exhibit B, attached)

The claim that appellate counsel was ineffective for failing to complain about the numerous improper comments by the prosecution, which were repeatedly objected to by trial counsel, has been found to be constitutional, substantial, and meritorious. See Seehan v. Iowa, 37 F3d 389 (8th Cir. 1994) (granting federal habeas relief where counsel failed to raise claim of improper argument by the prosecution during closing argument) and Freeman v. Lane, 962 F2d 1252 (7th Cir. 1992) (granting habeas relief where appellate counsel failed to raise claim of improper closing argument).

3. In Martinez v. Ryan, 132 S.Ct. 1309 (2012), the U.S. Supreme Court abrogated the procedural default rule governing collateral proceedings carved out in Coleman v. Thompson, 511 U.S. 722 (1991), in holding that a claim "in an initial review collateral proceeding" should not be barred on procedural grounds where it was filed without the assistance of counsel, or where it was counsel's deficient performance in filing the initial collateral review that led to the procedural bar. Also see Barnett v. Roper, 941 F.Supp2d 1099 (E.D. Mo., 2013) (applying Martinez v. Ryan, supra)

Since ineffective assistance of counsel during the post-conviction proceedings is the cause for the instant claim not being raised in the initial, timely filed postconviction relief motion, Martinez v. Ryan, supra, provides the gateway for the claim raised in the instant petition to be heard for the first time.

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ___ No X

(d) If your answer to (c) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the result and the date of the court's decision

(e) Did you receive an evidentiary hearing on your motion or petition? Yes ___ No X

(f) Did you appeal from the denial of your motion or petition? Yes ___ No X

(g) If your answer to (f) is "Yes," state whether this issue was raised in the appeal, Yes ___ No ___, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order) N/A

(h) If your answer to question (e), (f) or (g) is "No," briefly explain Post- conviction counsel was ineffective.

Other Remedies

(i) Describe all other procedures (such as administrative remedies, etc.) you have used to exhaust your state remedies as to the issue

Filed Motion to Recall the Mandate in the Missouri
Court of Appeals, Eastern District. Denied as procedurally
barred.

Claim Two: N/A

(1) Supporting Facts: (Without citing legal authorities or argument state briefly the facts in support of this claim)

N/A

(2) Statement of exhaustion of state remedies as to claim two:

Direct Appeal

(a) If you appealed from the judgment of conviction, did you raise this issue? Yes ___ No ___ N/A

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not N/A

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ___ No ___ N/A

(d) If your answer to (c) is "Yes," state the type of motion or petition, the

N/A

name and location of the court where the motion or petition was filed, the case number (if known), the result and the date of the court's decision

N/A

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes ___ No ___ N/A

(f) Did you appeal from the denial of your motion or petition?

Yes ___ No ___ N/A

(g) If your answer to (f) is "Yes," state whether this issue was raised in the appeal, Yes ___ No ___, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order)

N/A

(h) If your answer to question (e), (f) or (g) is "No," briefly explain _____

N/A

Other Remedies

(i) Describe all other procedures (such as administrative remedies, etc.) you have used to exhaust your state remedies as to the issue

N/A

Claim Three: N/A

(1) Supporting Facts: (Without citing legal authorities or argument state briefly the facts in support of this claim)

N/A

(2) Statement of exhaustion of state remedies as to claim three:

Direct Appeal

(a) If you appealed from the judgment of conviction, did you raise this issue? Yes ___ No ___ N/A

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not N/A

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ___ No ___ N/A

(d) If your answer to (c) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the result and the date of the court's decision

N/A

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes ___ No ___ N/A

(f) Did you appeal from the denial of your motion or petition?

Yes ___ No ___ N/A

(g) If your answer to (f) is "Yes," state whether this issue was raised in the appeal, Yes ___ No ___, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order)

N/A

(h) If your answer to question (e), (f) or (g) is "No," briefly explain _____

N/A

Other Remedies

(i) Describe all other procedures (such as administrative remedies, etc.) you have used to exhaust your state remedies as to the issue

N/A

18) Have all claims for relief raised in this petition been presented to the highest state court having jurisdiction? Yes ___ No X N/A

19) If you answered "No" to question 18, state which claims have not been so presented

and briefly give your reasons(s) for not presenting them All claims. Counsel on direct appeal and postconviction counsel were ineffective

20) If any of the claims listed in this application were not previously presented in any other court, state or federal, state briefly what claims were not so presented, and give

your reasons for not presenting them All claims. Counsel on direct appeal and postconviction counsel were ineffective

21) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes ___ No X

If "Yes," answer the following and attach a copy of the court's decision for each petition, application, or motion filed:

- a) Name and location of court N/A
- b) Type of proceeding N/A
- c) The issues raised N/A
- d) The result N/A

SUCCESSIVE APPLICATIONS

This court is required to dismiss any claim presented in a second or successive petition that the federal court of appeals has authorized to be filed unless the applicant shows that each claim satisfies the requirements of 28 U.S.C. § 2244, **as amended** by Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214 (Apr. 24, 1996).

22) If you are raising a claim which you have not presented in a prior application, have you obtained an order from the United States Court of Appeals for the Second Circuit authorizing this district court to consider the application? Yes ___ No ___ N/A
If "Yes," please attach a copy of the order.

23) Do you have any petition, application, motion or appeal now pending in any court, either state or federal, regarding the conviction under attack? Yes X No ___ If "Yes," state the name of the court, case file number (if known), and the nature of the proceeding Appeal from denial of motion for postconviction relief in Missouri Court of Appeals. Case No. ED102379

LEGAL REPRESENTATION

24) Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Herman Jimerson, 225 South Meramec Ave., St. Louis, MO 63105

(b) At arraignment and plea same as above

(c) At trial same as above

(d) At sentencing same as above

(e) On appeal Michael Gross, 190 Carondelet Plaza, St. Louis, Mo. 63105

(f) In any post-conviction proceeding Kevin Schriener, 141 North Meramec, Clayton, MO 63105

(g) On appeal from any adverse ruling in a post-conviction proceeding Amy Faerber, 1010 Market St., St. Louis, MO 63101

OTHER CONVICTIONS

25) Were you sentenced on more than one count of an indictment or on more than one indictment, in the same court and at the same time? Yes X No

26) Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes No X

(a) If so, give name and location of court which imposed sentence to be served in the future N/A

(b) and give date and length of service to be served in the future N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ___ No ___ N/A

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

Kenneth Lee

Petitioner's Original Signature

532213

Petitioner's Inmate Number

Attorney's Full Address and
Telephone Number

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he/she is the petitioner in this action, that he/she has read this petition and that the information contained in the petition is true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed at Jefferson City, MO on July 14, 2015
(Location) (Date)

Kenneth Lee

Petitioner's Original Signature